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of the

United States

No. 77-621

DADE CHRISTIAN SCHOOLS, INC.,
Petitioner,

vs.

JOHNNY BROWN, JR., etc., et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents, JOHNNY BROWN, JR., etc., et al., Plaintiffs in the District Court and Appellees in the Circuit Court of Appeals, by and through their undersigned attorney, respond to the Petition for Writ of Certiorari to the U. S. Court of Appeals, Fifth Circuit, Case No. 75-3260, reported at 356 F.2d 310 (1977), and respectfully join with Petitioner for issuance by this Court of its Writ of Certiorari to the said Circuit Court of Appeals.

INVOCATION OF JURISDICTION

Respondents concur that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

Respondents would state these as follows:

QUESTION #1:

DID DADE CHRISTIAN SCHOOLS, INC., HAVE STANDING AND GROUNDS TO ASSERT FIRST AMENDMENT DEFENSE FOUNDED ON THE FREE EXERCISE OF RELIGION CLAUSE THEREOF TO THE CLAIM OF THE BROWN FAMILY (BLACKS) FOR ADMISSION TO THE SCHOOL BASED ON PRIVATE INTERESTS GUARANTEED BY AMENDMENT 13 TO THE U. S. CONSTITUTION AS ENACTED BY THE U. S. CONGRESS AS SECTION 1981, TITLE 42, UNITED STATES CODE?

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STATEMENT OF THE CASE

Respondents agree with the Statement of the Case recited in Petitioner's Brief, pages 4 through 10, with the following addition:

While it is true that the Court of Appeals affirmed (7 to 6) the judgment of the District Court calling for damages to the Brown family of $5,500 and injunctive relief, of equal import was the voting alignment on the crucial issue of whether or not the School's beliefs were sufficiently "religious" to allow the School to assert a Free Exercise Clause defense to Brown's claims. It appears that of the 13 Appellate Judges voting, only 5 (Hill, Godbold, Dyer, Morgan and Gee) found that the Free Exercise Clause was *not* available to the School. Contrariwise, the remaining 8 (Roney, Gewin, Coleman, Ainsworth, Clark, Tjoflat, Goldberg and Brown) either found that the School was entitled to the defense or, upon assuming that defense as valid, that the defense was subordinate to Browns' rights under 42 U.S.C. §1981 and the Thirteenth Amendment.

REASONS FOR ALLOWING THE WRIT

Respondents will answer all the Questions Presented for Review herein.

It is some four and one-half years since the black Browns tried to register their girls at the private secular Dade Christian School. The School refused on the admitted grounds of non-integration. The Browns sued in Federal Court, asking damages and injunctive relief, on the grounds that they were denied the equal right to enter into a contract with the School (42 U.S.C. §1981) because of their color. The School answered that it had the right to discriminate colorwise, since to admit black children would interfere with the School's free exercise of religion, which includes non-mixing of races.

Litigation was conducted in the District Court. The Respondents here and now candidly admit to this Court that as the facts and legal issue developed, it became apparent that a confrontation between the Thirteenth Amendment rights of the Browns and the First Amendment rights of the School would, and should, result in a judicial balancing act. Before that could happen, however, subsidiary issues would have to be decided.

A. Both the District and Court of Appeals found that *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir., 1975), as affirmed in *Runyon v. McCrary*, 427 U.S.160 (1976) was controlling here regarding the issue of whether or not 42 U.S.C.A. §1981 applied to discrimination by a private school. This Court, in *Runyon*, held that §1981 reaches private conduct and prohibits private non-

sectarian schools from denying admission to prospective students because they are black.

[It is important to note here that *Runyon* did not address itself to the issue calling for resolution at Bar: Congressionally created civil rights versus the Free Exercise of Religion Clause.]

B. Once over the private-school-cannot-discriminate hurdle, there remained but two others for the Courts to traverse, to-wit: Was the policy of Dade Christian Schools, Inc., tantamount to a religious belief, thus allowing the School to assert a defense of First Amendment proportions? And

C. The last issue to be decided is the one referred to as "the balancing act": Whether sufficient governmental interests justify interfering with the School's religious practices of segregation?

Respondents filed their Complaint 4½ years ago hoping to put to rest the last vestige of school segregation, whether public or private, secular or non-secular, religious or not. The award of damages and an injunction by the District Court was not unexpected; the reasons for same were. Now, the fears of segregation are no more abhorrent to the Respondents than are those expressed by Circuit Judges Goldberg and Coleman in their specially concurring and dissenting opinions, respectively, below, *concerning the possible interference with the exercise of religion.* Respondents did not share

this fear at the District or Circuit Court of Appeals levels; the long passage of time . . . research . . . the Briefs of opposing counsel . . . the learned opinion of Judge Goldberg . . . reflection . . . and the future of this society compels them now to urge this Court to grant its Writ of Certiorari, find that Dade Christian's defense of Free Exercise of Religion *should be allowed,* and then balance that defense with the claim of the Browns that the Thirteenth Amendment proscribes slavery and §1981 was enacted "to eradicate some of the badges and incidents of slavery"; therefore, the admittedly very minor aspect of the Schools' religious practice — segregation — should be outweighed by the government's interest in enforcing a black child's opportunity for equal education and equal enforcement of contracts.

Overriding the defense of Free Exercise of Religion will not endanger the Schools' survival; allowing blacks as students will not alter the curriculum or teaching methods; the School could still teach that racial segregation is a religious necessity. To rule otherwise would swing open the doors once again to church-affiliated white academies dedicated to the proposition that all men are not created equal and that all that must be done to reinstitute segregation is to create a new religion or church . . . attach a school . . . admit only whites . . . and prohibit blacks on the basis that to commingle blacks and whites is against the free exercise of their religion.

Getting to whether or not Dade Christian had grounds to assert the Free Exercise of Religion Clause, Respondents are most impressed with the cases of *Wisconsin v. Yoder,* 1972 406 U.S. 205; *Sherbert v. Verner,* 1963, 374 U.S. 398; *United States v. Seeger,* 1965,

380 U.S. 163; and *United States v. Ballard*, 1944, 322 U.S. 78. Together, these seem to indicate that the depositions and evidence submitted to the District Court at Bar, by both parties, prove the contention of Petitioner that the practices of Dade Christian are truly entitled to the shield of the Free Exercise Clause. Respondents would rather this Court err on the side of *finding* for the School on this issue than to erode (by a contrary ruling) everyone's right to religious beliefs and activities based thereon. Of course, when those activities are overcome by sufficiently "compelling" governmental interest, as here, then the claim of the Brown family to equality and non-slavery should prevail.

Respondents would join with Petitioners, and Judges Goldberg and Roney below, in urging this Court to "maintain an unrelenting vigil over first amendment freedoms" by granting this Writ and then searching the record itself for the true answers. "Religion" should be defined broadly rather than by specific labels; at Bar, Respondents concede that Dade Christian meets the criteria of sincere beliefs based on the nature of man's place in the Universe as described in the Holy Bible. These beliefs do not have to be approved by all or even written down; nor must they be of ancient origin. And the School can assert these beliefs for its students, faculty, administration and parents.

From the foregoing, it is imperative that this Court consider Dade Christian's defense of Free Exercise on its merits instead of affirming that those beliefs are not "religious."

Respondents also join with those who would progress to "the balancing act." There is no need to remand for further evidence; all that is in and the issues remain unchanged. All that remains is a question of law. Not only are Respondents eager to end their case, but a final decision by this Court will have a far greater significance. This Court is herewith presented a question of great public interest never before decided. *Sherbert v. Verner*, supra, applied the "compelling state interest" test to governmental restrictions of religious activity. In that opinion, this Court opined:

> "On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, it is not totally free from legislative restrictions . . . The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order . . .' (citations omitted) 374 U.S. at 402-403.

In this case, it is a possible re-birth of school segregation that poses a substantial threat to public safety, peace or order.

It was in *Wisconsin v. Yoder*, supra, that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion," were set forth as the test. Racial exclusion is such an interest.

Respondents herewith, for the purpose of this Response and at this stage, adopt the cogent arguments of Judge Goldberg below (Petitioner's Brief, App. B-24 through 31), as concurred in by Chief Judge Brown in concluding and urging this Court to decide "that governmental interest in desegregation of schools outweighs the First Amendment claim" of Dade Christian Schools, Inc.

CONCLUSION

Respondents urge this Court to take jurisdiction and then decide the vibrant, critical questions presented by these facts. *Brown v. Board of Education* of 1954, outlawing segregation in public schools, has been augmented in 1976 by *Runyon* which condemned racial exclusion in private non-sectarian schools. To complete the task, Respondents would now ask this Court to rule on *Dade Christian Schools, Inc. v. Brown* and end racial segregation in the last refuge, the private, religiously based school.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Response were mailed this ____ day of January, 1978, to Lawrence R. Metsch, Esq., Shutts & Bowen, Tenth Floor, Southeast First National Bank Building, Miami, Florida 33131.

ELLIS S. RUBIN